**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| In re: Southern California Edison Company, | ) | No. 00-1543 |
| Petitioner. | ) | |

**RESPONSE OF THE**
**FEDERAL ENERGY REGULATORY COMMISSION**
**IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

Pursuant to Fed.R.App.P. 21(b), Circuit Rule 21, and this Court's December 27, 2000 Order, the Federal Energy Regulatory Commission ("FERC" or "Commission") opposes the petition for a writ of mandamus filed by Southern California Edison Company ("Edison").[1] Invoking the All Writs Act, 28 U.S.C. § 1651(a), Edison seeks a writ "directing FERC to determine and fix by order just and reasonable cost-based rates to be observed and in force for sales in the [California] ISO and PX markets, and providing that, for the period of time between the date of that order and the date when such cost-based rates have been determined and put in place, FERC will order refunds for all amounts collected in excess of those ultimately found just and reasonable." Pet.19-20.

Mandamus may not properly be considered in the current posture of the proceeding. Even if mandamus could be considered, Edison has not come close to meeting its heavy burden of showing a clear

[1] Edison challenges two FERC orders, included in Attachment 3 of Volume II of Edison's Petition: *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,121 (2000) ("November 1 Order") and *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,294 (2000) ("December 15 Order"). Rehearing of the November 1 Order is currently pending, while the statutory time for filing rehearing petitions of the December 15 Order has yet to run.

and indisputable right to issuance of this extraordinary writ. Finally, Edison has not met the four-part criteria for issuance of extraordinary relief. Accordingly, the writ should be denied.

## FACTUAL BACKGROUND

Rather than looking for relief that goes to the heart of its claimed problems, Edison asks this Court to enable Edison to continue on a course of conduct – over-reliance on spot market purchases of electricity -- that, by Edison's own admission, could result in potentially serious adverse consequences for Edison and its customers. In light of FERC's recent action, resolution of Edison's asserted problems, including a possibility of bankruptcy, potentially continued spiraling electricity prices, and potential blackouts, shifts to state regulatory authorities, including the California Public Utilities Commission ("CPUC"). Edison's proposed relief from FERC is not intended to and could not solve the past undercollection on which the bankruptcy claims rests, will not necessarily prevent higher electricity prices, and would almost certainly exacerbate an already woeful supply situation in California. In the Orders at issue, the FERC acted within its statutory authority to provide short term price mitigation measures, refund and investigation mechanisms, and longer term structural changes, all designed to remedy the root of the problems facing the California wholesale electricity markets while protecting consumers until all remedies are in place. The CPUC and other state authorities must correspondingly address problems residing within their jurisdiction.

Until recently, Edison and other investor owned utilities ("IOUs") benefitted greatly from California's mandated method of purchasing electricity at market prices on the spot market about which Edison now complains. Edison, with its proposal for stop-gap measures from FERC, seeks to enable Edison and other IOUs to ride out the hard times without addressing the serious underlying problems that the purchasing method is causing in the California wholesale electric markets. This Court should not enable continued

reliance on a defective purchasing method by slapping Edison's proposed band-aid on it. A band-aid approach will not solve the underlying problems, including obtaining sorely needed new generation for California, resulting from that method. Accordingly, the Court should deny the writ.

In simple terms, Edison seeks to continue purchasing practices, established by the California restructuring law and implemented by the CPUC, that primarily rely on spot market purchases through a single price auction to fulfill virtually all California IOUs' electricity generation needs. It is simply unheard of for any utility, much less all IOUs in a State, to rely on spot purchases for virtually all its needs. Even electricity generated by Edison and other IOUs, rather than being sold to their retail customers on the basis of its costs, must be sold into and repurchased from the now higher priced spot market. Nonetheless, up until this past summer, the California electricity market after restructuring was, again in simple terms, a buyer's market with relatively low demand compared to available supply. In that buyer's market, heavy reliance on spot market purchases was a successful strategy. Consumer retail rates were frozen at a level that was less than what was charged prior to restructuring, but that was still higher than the prices paid by IOUs for electricity purchases.[2] In the past few months, the California electricity market, for a variety of reasons, *see, e.g.*, November 1 Order at 61,353, shifted to a seller's market with relatively high demand compared to available supply and no change in the frozen rates for Edison's customers. In these circumstances, continued heavy reliance on spot market purchases helped to produce the results presented to this Court. Pet. 5-6.

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[2] This strategy was adopted, in part, as a means to pay for stranded costs. The favorable conditions in the California electricity market resulted in "the IOUs [being] able to write off substantial amounts of stranded costs." November 1 Order at 61,360.

The Commission initially deferred to California's proposed restructuring plan by accepting in FERC-filed tariffs most of the State-developed requirements for wholesale matters, including the high level of reliance on the wholesale spot market and the use of a single price auction to set wholesale rates. This approach worked reasonably well until the past summer, when a confluence of factors hit the markets. Once the Commission became aware of the serious economic impact that the existing wholesale market structure was having on California, it took expeditious action. The Commission not only responded to numerous formal and informal complaints, comments, and inquiries, but also it held hearings both here and in California and ordered its Staff to investigate the issues. *See generally* November 1 Order at 61,353-56 and December 15 Order at 6-22 (describing events).

Based on evaluation of all this information, the Commission concluded, in essence, that it was no longer just and reasonable for California IOUs to rely on wholesale spot market purchases, with their inevitable volatility, for virtually all their needs. To that end, and recognizing its limited jurisdiction, the Commission proposed both immediate price mitigation steps to stem the current difficulties and longer-range (up to two years) steps to prevent reoccurrence of this situation. The stated goal is to shift from heavy reliance on spot purchases to adoption of a portfolio approach that combines forward (long term) and spot purchases as a means of managing risk. *E.g.*, November Order at 61,359. These sweeping changes have yet to be put into effect by the IOUs or the CPUC.

Instead, Edison asks this Court to replace market pricing for the spot market with a vague cost-of-service approach that Edison hopes will result in lower prices. Putting aside the serious legal and policy problems with Edison's approach (to which we will presently return), compelling practical concerns suggest that Edison's proposal will not be the panacea for Edison's claimed ills.

Edison requests that this Court direct "FERC to determine and fix by order just and reasonable cost-based rates to be observed and in force for sales in the ISO and PX markets." Pet. 19. Initially, the Federal Power Act ("FPA"), 16 U.S.C. § 824 *et seq*., restricts FERC's ratemaking authority to "public utilities."FPA § 201. Public utilities do not, however, comprise the entirety of those making sales in the ISO and PX markets. Thus, only a portion of the sellers will be subject to Edison's proposed cost of service pricing. Assuming continuation of the single price auction under which the highest accepted bid price clears the market, it is likely that non-cost-based bids by suppliers other than public utilities (*e.g.*, municipal utilities) would still set market-clearing prices.

Even assuming that bidders subject to cost-based rates would clear the market, how cost-based rates would be determined is problematic. As demand rises, most sellers normally progress from lower-cost to higher cost generating units to satisfy the increased demand. This fact raises essential questions -- such as, whether cost of service rates should be set on a per seller or a per unit basis and whether different cost of service rates should apply at differing demand levels -- that must be decided before a cost of service analysis for application to spot market auctions could be initiated.

More fundamentally, the simple question exists of whether the proposed change would give Edison the relief it seeks. Edison is apparently hoping that imposition of cost of service ratemaking would return it to the halcyon days of past spot markets when its average monthly price "never exceeded $40/Mwh." Scilacci Declaration ¶ 4. Yet, independent investigations revealed that "peak demand running costs [roughly comparable to marginal costs] can be in the range of $160 to $200/Mwh for some units, . . . [and] variable costs during peak periods can approach $500/Mwh for some units." November 1 Order at 61,368 n.86 (citations omitted).

In sum, the quick fix that Edison seeks from this Court may be neither quick nor a fix. Equally troubling, it is unclear whether this fix would benefit consumers with lower prices, and it could interfere with the development of much-needed generation. Finally, if Edison's proposed fix were to replace the plan adopted by FERC, Edison could maintain its heavy dependence on the spot market, thus virtually guaranteeing a reoccurrence of these same problems.

## ARGUMENT

### I. Mandamus Is Not Appropriate Procedurally Or Substantively

#### A. Procedurally, Edison's Petition Is Premature

Initially, the Court should ask whether Edison's petition is properly presented at this time. Had Edison filed a petition for review, it would be dismissed as "incurably premature" because rehearing of the November 1 Order is pending and the statutory period for rehearing of the December 15 Order has yet to run. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C.Cir.1989) ("the filing of a challenge to agency action before the agency has issued its decision on reconsideration is incurably premature."); *accord Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981 (D.C.Cir. 1993). The question here is whether that result changes because Edison has filed for mandamus. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)(question presented by petition for review of interlocutory court order is "whether a litigant may obtain a review of an order concededly not appealable by way of mandamus."). The Commission submits that the answer is "No."

In view of the FPA's explicit mandate that a petition for review cannot be brought unless rehearing has been sought, [3] FPA § 313(a), and "the clear legislative preference for review of final action, [this Court] must be circumspect in exercising jurisdiction over interlocutory petitions," including petitions for mandamus. *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 79 (D.C.Cir. 1984)("*TRAC*"). As a result, "[o]nly in rare instances is a non-final agency action reviewed in the teeth of a general denial of jurisdiction." *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1178 (D.C.Cir. 1979)(Leventhal, J., concurring).[4]

Edison's reliance on cases granting mandamus so as to preserve a court's jurisdiction in the face of agency inaction, Pet. 8, is misplaced. First, the current situation began in May, 2000, Pet. 5; FERC action within months can hardly be considered delay to avoid court review. Second, even if action had been delayed, Edison must pass a "high threshold" to obtain mandamus where agency action is ongoing. *TRAC*, 750 F.2d at 79. As we show next, Edison has not passed that threshold.

**B. Substantively, Granting Edison's Petition Is Not Justified**

To justify issuance of a writ of mandamus requires a showing that "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Northern States Power Co. v. U.S. Dept. of Energy*, 128 F.3d 754, 758 (D.C. Cir.

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[3] Edison did file for rehearing (Petition, Vol. II, Attachment 4) on December 18, and stated that unless action was taken by December 20, it would file for "immediate relief from the Court of Appeals." Edison cannot shorten the 30-day statutory rehearing period, FPA § 313(a), nor can it shorten the statutory 30-day period after which non-action by FERC is deemed denial of a rehearing petition. *Id.* Thus, at this point, Edison's rehearing must be considered as pending.

[4] Or, as the Supreme Court, borrowing from Gilbert & Sullivan, put it: "our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: 'What never? Well, *hardly* ever!'" *Daiflon*, 449 U.S. at 36 (emphasis in original).

1997)(citations omitted). A party seeking mandamus has the burden to show that "its right to issuance of the writ is clear and indisputable." *Id*. (citations omitted). Applying that test to petitions of non-final agency actions, such as presented here, Judge Leventhal stated that the "clear right" criterion required a showing of "an outright violation of a clear statutory provision . . . or violation of basic rights established by a *structural* flaw, and not requiring *in any way* a consideration of the interrelated aspects of the merits - which can only be done appropriately on review of a final order." *Nat'l Advertisers*, 627 F.2d at 1180 (emphasis in original); *accord TRAC*, 750 F.2d at 79.

Although Edison attempts to cast its case as "an outright violation of a clear statutory provision," *see* Pet. 10-12, it is apparent from comparison with *Northern States* that Edison is really asking this Court to consider the merits of the Orders at issue. Edison asks this Court to direct the Commission to set "just and reasonable cost-based rates" (Pet. 19) for sales into the ISO and PX markets, but fails to show that the language of the FPA clearly requires the Commission to set just and reasonable cost-based rates. That failure reflects the fact the FPA does not specify cost-based (or any other) ratemaking methodology as the sole means to set just and reasonable rates. This contrasts with *Northern States*, where mandamus was sought to require action by a date certain. The Court found that the relevant law "clearly demonstrates a congressional intent that the Department assume a contractual obligation to perform by the 1998 deadline, 'without qualification or conditions'" as well as that a clear contractual obligation required the Department to do so. 128 F.3d at 758.

The need for such statutory clarity before a court takes extraordinary mandamus action is particularly acute in cases involving non-final agency actions. Otherwise, a court is forced to address the merits of a matter before an agency completes its review. That is what Edison seeks to have this Court do.

Clearly, Edison disagrees with the Commission's approach to this matter, and has offered argument interpreting cases in support of its position. Pet. 11-13. Such argument is properly the stuff of a brief on review after rehearing under FPA § 313, and not of a mandamus petition. Accordingly, Edison has not met the first criterion for issuance of a mandamus.

On the second criterion, FERC's clear duty to act, aside from arguing that the Commission did not act in that way that Edison thinks proper under the FPA, which is addressed under the first criterion, Edison's petition does not suggest that the Commission shirked its duty to act, *compare TRAC,* 750 F.2d 70 (request based on alleged unreasonable delay in taking action), but, rather, that Edison disagrees with how FERC acted. Thus, this criterion does not favor mandamus.

Nor has Edison made a showing that no other adequate remedy is available to it, the final criterion of the mandamus test. In *Northern States*, this Court, despite finding the other criteria were met and a claimed loss of billions of dollars if mandamus did not issue, declined to issue a writ because petitioners "are presented with another potentially adequate remedy," in the form of contract mitigation. 128 F.3d at 759. Here, Edison is presented with at least three potentially adequate remedies. First, Edison is pursuing relief from the CPUC to end the rate freeze and "authorize a rate increase which will provide assurance that all procurement costs will ultimately be recovered in retail rates." Scilacci Declaration at ¶ 14. Second, Edison could pursue the price mitigation remedies identified by FERC, namely to cease its over-reliance on spot purchases.[5] This is a primary flaw that the Commission found contributed to the present situation.

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[5] To some degree, these remedies require action by the CPUC, *e.g.,* to release IOUs from their PX buy obligations. December 15 Order at 35. Nonetheless, Edison, instead of ceasing its self-destructive purchase behavior, asks this Court to require that the Commission, in effect, depress the

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December 15 Order at 25. Third, Edison could take advantage of the refund protection period (commencing October 2, 2000) adopted by the Commission, November 1 Order at 61,370, to seek recovery of any unjust and unreasonable amounts it believes it has been charged by individual generators. These potentially adequate remedies weigh heavily against granting mandamus.

In sum, Edison has failed to show that a writ of mandamus could or should issue.

## II. Under The Extraordinary Relief Test, Edison Is Not Likely To Prevail On The Merits

Even if the petition could be considered under the traditional four-part criteria for evaluating whether a stay should issue, as Edison asserts (Pet.10), analysis of the four criteria indicate that Edison has not shown the balance tips decidedly in its favor to warrant issuance of the writ.

### A. The FPA Does Not Require Rates To Be Set On A Cost-Of-Service Basis

If the Court considers the petition, Edison has not, and cannot, demonstrate that it is clearly entitled to a Court order requiring FERC to set just and reasonable cost-based rates in this case. Distilled, Edison's petition seeks costs-based rates on grounds that such a result will allow Edison to obtain capital. *See, e.g.*, Scilacci Declaration ¶ 15 (FERC order setting cost of service rate standard and allowing refunds "will send

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[5](...continued)
current market pricing for spot sales by substituting cost-based rates for market pricing. The Commission should not be required to transform spot market pricing from its natural volatile, market-driven state into something it is not (stable, long-term, and cost-driven) just to save Edison from its self-destructive path of over-reliance on spot market purchases.

the essential signal to the financial community that SCE and other electric utilities in California will not be caught in an endless debt spiral."). The Commission cannot, and did not, act on such limited grounds, but considered a much wider set of public interest factors. Edison's narrow focus on sellers' costs and its own capital needs has long been rejected:

> The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the "end result" of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they "maintain . . . credit and . . . attract capital."

*Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968)(footnote omitted). Edison's approach overlooks other compelling public interest considerations that required changes be made to the market structure as a means of assuring just and reasonable rates. Given California's current critical supply deficiencies, an important public interest consideration is providing incentives to "attract new suppliers" so as to avoid supply disruption. *See* November 1 Order at 61,369.

Edison's argument posits that because the Commission found that the California electricity markets are "seriously flawed," and "have caused and continue to have the potential to cause, unjust and unreasonable rates for short-term energy," the Commission must, as a matter of law, establish cost-based rates. Pet. at 13-14 and 17. Edison's position is incorrect. In the first place, market-based rates are clearly lawful in appropriate circumstances. *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993). Next, neither the statute nor case law establishes cost-based rates as the sole, or even the default, just and reasonable ratemaking methodology:

> the Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. . . . Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. . . . If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.

*FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). *See Wisconsin v. FPC*, 373 U.S 294, 309 (1963)("the Court has never held that the individual company cost-of-service method is a *sine qua non* of natural gas regulation"). Here, the Commission chose structural remedies for the market flaws along with enhanced refund and monitoring protection as the fix to assure just and reasonable rates. As *Hope* demonstrates, the Commission acted well within its discretion in doing so.

**B. The Commission Adopted Remedies Tailored to Its Findings**

Despite Edison's implications to the contrary, Pet. 3, the Commission did not find, and "this record does not support[,] findings of specific exercises of market power." November 1 Order at 61,350. Moreover, the Commission "did *not* find that all rates, at all times, were unjust and unreasonable in these spot markets." December 15 Order at 33 (emphasis added), but, rather, that the structure and rules for wholesales sales can and have caused unjust and unreasonable rates at certain times under certain conditions. *Id*. at 32-33. Despite its inability "to reach definite conclusions about the actions of individual sellers," the Commission was able to make general findings that "the California market structure and rules provide the opportunity for sellers to exercise market power when supply is tight and can result in unjust and unreasonable rates under the FPA." *Id*.

Having found the statutory prerequisite for FPA § 206 action related to these general matters, the Commission took "action to establish market rules, regulations and practices that will ensure just and reasonable rates in the future." *Id*. Besides its action to reduce dramatically reliance on spot market

purchases, FERC set a $150 auction breakpoint for remaining spot market transactions. This means that for bids above $150, the highest bid will not set the price for all bids. Further, all suppliers who receive a price above $150 must report certain information to the Commission. This information will be reviewed by the Commission, beginning January 10, 2001, to determine whether it shows the seller exercised market power or otherwise sold at an unjust and unreasonable rate. Finally, these sales are subject to refund protection so that any unjust and unreasonable rates can be remedied. *See* November 1 Order at 61,367-68 (explaining plan).

In short, where the Commission found the necessary FPA § 206 prerequisite, it acted to remedy the situation, and where it has not yet established the necessary prerequisites, it has not yet acted. That is precisely what the statute requires. Edison, in contrast, asks that cost of service rates apply to all jurisdictional rates at all times, even though the necessary § 206 prerequisite for adopting Edison's plan -- existing rates were unjust and unreasonable at all times -- was not made. The absence of such a finding precludes Edison's sweeping § 206 remedy.

Edison also charges that the Commission "turned the FPA on its head" because the Commission rejected cost based regulation on grounds that "it reflects the cost of the asset without any regard to market conditions." Pet. 16, citing December 15 Order at 52. As in much of its argument, Edison does not examine all the factors that the Commission must consider. Far from turning the FPA on its head, the Commission's rejection of cost-based regulations as a remedy for the problem in California furthered two goals of the FPA: to assure adequate supply for consumers at a reasonable price. In the sentences immediately following the above-quoted sentence on which Edison focused, the Commission explicated the reasoning

for rejecting cost-based regulation as a remedy: "The one thing that California needs most is new supply[[6] ] and a return to traditional cost of service ratemaking will not encourage supply to enter the California market. We note that, under cost-based regulation, California had some of the highest retail rates in the country." December 15 Order at 52. In similar fashion, the California ISO capped its purchase price until December, when it, too, realized that capping prices drove away sellers. *See* "Order Accepting Tariff amendment On An Emergency Basis," 93 FERC ¶ 61,239 (December 8, 2000) (attached).

Thus, the actual experience in the California market does not support Edison's position that the Commission's action will fail to result in just and reasonable rates or that returning to a cost of service approach is the only way to fulfill the FPA's mandate. The Commission reasonably relied on past experience to find that cost-based pricing would not yield the necessary public interest benefits, and that the adopted price mitigation and market structure changes offer the best chance to provide adequate supplies of electricity at just and reasonable rates.

## II. Edison Will Not Suffer Irreparable Harm If The Court Denies The Petition

An essential basis for extraordinary relief is irreparable harm due to the inadequacy of legal remedies. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted). The harm must be both "certain and great; it must be actual and not theoretical." *Id.* Edison's harm allegations are speculative, and thus do not satisfy its burden on this ground.

Edison summarizes its claimed harm if this Court does not grant mandamus:

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[6] Currently, California's peak load and its available in-state installed capacity both approximate 45,000 MW; that is, supply barely meets demand. This equipoise is due in part to the fact that between 1996 and 1999, California's peak load grew by 5,500 MW, while only about 700 MW of new generation were added. November 1 Order at 61,367.

> If regulatory action from . . . FERC is not immediately forthcoming, sufficient to reestablish creditor confidence, then the banks have stated that additional funding will not be available. If so, and given the schedule of [Edison's] obligations, then in mid-January 2001, it is likely that [Edison] will be forced to limit its expenditures to available cash. In that case, in my opinion, it is likely that service interruptions and rolling blackouts will be inevitable.

Pet. at 17-18, selectively quoting from Scilacci Declaration ¶ 17. Edison's allegations are insufficient to support irreparable harm. As this Court has stated regarding injunctions:

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

*Wisconsin Gas Co.*, 758 F.2d at 674 (emphasis in the original). Edison's allegations are based on a series of steps that it thinks are "likely" to occur, not a showing that they will "in fact" occur.

There is no assurance that relief from this Court will remedy the alleged harm. Mr. Scilacci's declaration, when read with the ellipsis removed, requires two-fold action to remove the alleged harm: "[i]f regulatory action from *the CPUC and* FERC is not immediately forthcoming." (Emphasis denotes missing words). This Court has not been asked to take any action with regard to the CPUC, even though such action appears by Mr. Scilacci's statement to be required if the claimed harm is to be avoided. In addition, it appears that CPUC action may obviate the need for this Court to act, given that CPUC action could allow Edison to recover all or some portion of Edison's claimed undercollection and could signal consumer responsibility for future amounts.[7]

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[7] Another avenue of relief may be found in *Pacific Gas and Electric Co. v. Lynch et al.*, No. 00-4128 (N.D. Ca.)(Complaint filed November 8, 2000), which seeks declaratory and injunctive relief on grounds that the costs paid by IOUs in California under FERC-approved tariffs must be passed on

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Edison cannot demonstrate that "service interruptions and rolling blackouts are inevitable," Scalacci Declaration ¶ 17, for the additional reason that under FPA § 202(c) the Secretary of Energy exercised authority to order generators and marketers to make power available when an emergency exists. The Secretary has already extended such orders to avoid interruptions and blackouts by assuring adequate energy supplies for California.

Edison has claimed harm before attempting to give the Commission's market reforms a chance to work. One remedy that Edison has yet to try (and which requires CPUC approval), but which appears could have immediate efficacy, involves freeing Edison from the PX buy/sell requirements. This would enable Edison to make direct sales to its customers from its own generation sources at cost and to enter into long-term purchase contracts or otherwise to manage its current risk of over-reliance on spot purchasing. This, according to Edison's own numbers, would have a dramatic effect. Mr. Scilacci states that Edison "has recorded a $3.2 billion undercollection [for total generation costs for May to November 2000]" and that after deducting "the revenues that [Edison] has earned from its own generation and contract portfolio [being sold at market clearing prices], SCE still has a net $1.4 billion undercollection." Scilacci Declaration ¶ 6. In other words, taking Edison's own generation out of the PX buy/sell and pricing it at cost for its retail customers would immediately reduce Edison's claimed undercollection by 56%.

In sum, Edison's claimed irreparable harm focuses on the possibility of service interruptions and rolling blackouts several steps down the road. As demonstrated, the likelihood of such harm is speculative, uncertain, and insufficient to support an extraordinary remedy.

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[7](...continued)
by the CPUC to retail customers under the filed rate doctrine.

III. **The Public Will Be Harmed If This Court Issues A Writ Of Mandamus**

Edison contends that no other party will be harmed if this Court issues a writ of mandamus, and that it is in the public interest for the Court to do so. Pet. at 18-19. Edison, however, has focused only on its immediate short-term interests and its incorrect assertion that FERC has violated the strictures of the FPA. As explained above and in the Commission's Orders, when viewed from the broader public interest perspective that the Commission must examine under the FPA, the proposed price mitigation and longer term structural changes offer a better chance of providing adequate supply at just and reasonable rates.

## CONCLUSION

For the reasons stated, Edison's petition for a writ should be denied.

Respectfully submitted,

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